**U.S. Department of Labor**

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

**Issue Date: 14 May 2003**

In the Matter of :

GEOVANNY GARCIA,
Claimant

v.

SUN TERMINALS, INC.,
Employer

and

FREMONT COMPENSATION
INSURANCE GROUP/INDUSTRIAL
INDEMNITY COMPANY,
Carrier

Case No.: 2000-LHC-1900
OWCP No.: 6-176503

Appearances:

Barry R. Lerner, Esq.
Barnett & Lerner, P.A.
Dania Beach, Florida
For the Claimant

Lawrance B. Craig, Esq.
Frank Sioli, Jr., Esq.
Valle & Craig, P.A.
Miami, Florida
For the Employer/Carrier

Before: Alice M. Craft
Administrative Law Judge

## DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901, et seq., and implementing regulations found at 20 CFR Part 702, brought by Claimant, Geovanny Garcia, against his Employer, Sun Terminals, Inc., and its insurance Carrier, Fremont Compensation Group/Industrial Indemnity Company. The Act

provides for payment of medical expenses and compensation for disability or death of maritime employees other than seamen injured on navigable waters of the United States or adjoining areas. In this case, Garcia alleges that he was disabled by an injury to his non-dominant left hand on June 9, 1998.

I conducted a hearing on this claim on July 23 and 24, 2001, in Fort Lauderdale, Florida. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 CFR Part 18. At the hearing, Claimant's Exhibits ("CX") 1-8, a Florida Workers' Compensation Notice of Denial, one LS-18 and six LS-207 forms, were admitted over the objection of the Employer/Carrier. Tr. at 30-34. CX 9, the deposition of Nadja Kross, was admitted without objection. Tr. at 153-154. Employer's Exhibits ("EX") 1-10, 12-22 and 24 were admitted into evidence without objection. EX 5, the deposition of Dr. Greener, and EX 21, the deposition of Dr. Freshwater, were re-designated as Joint Exhibits ("JX") 5 and 21. EX 11, records of nerve conduction studies by Richard Kishner, M.D., was admitted over Claimant's objection as to relevancy. EX 23, an excerpt from the AMA Guidelines to the Evaluation of Permanent Impairment, 4th Edition, was excluded as incomplete, with the caveat that I would take judicial notice of the Guidelines as necessary. Transcript ("Tr.") at 23-28. EX 25, five surveillance photographs, and EX 26, four surveillance videotapes, were also admitted without objection. Tr. at 234-235, 252. The record was held open after the hearing to allow the parties to submit additional evidence and arguments. I hereby admit the following additional exhibits which have been submitted timely by the Employer: Exhibit A, designated as EX 27, Garcia's Earnings Statement for the pay period ending April 21, 1998 and 1997 W-2; Exhibit B, designated as EX 28, five Job Analysis forms completed by Claire Lange; and Exhibit C, designated as EX 29, a report by Arnold S. Zager, M.D., dated March 27, 2001. Along with his closing argument, counsel for the Claimant submitted an Addendum attaching five pieces of correspondence, four written by counsel, and one written by Dr. Jack Greener. The Employer/Carrier objected and requested that all five letters be stricken from the record. The letters from counsel are more in the nature of colloquy and argument and as such will not be admitted into evidence. As the letter from Dr. Greener was written after the hearing and is relevant to the issue of the Claimant's free choice of a physician for psychiatric treatment authorized by the Employer/Carrier, however, I hereby admit it into the record as CX 10. The parties submitted closing arguments, and the record is now closed.

In reaching my decision, I have reviewed and considered the entire record, including all exhibits, the testimony at hearing and the arguments of the parties.

## STATEMENT OF THE CASE

Geovanny Garcia was employed by Sun Terminals, Inc., as a diesel mechanic. On June 9, 1998, he injured his left hand while using a sledgehammer to open a 55 gallon drum. He underwent treatment at a clinic, and then by orthopedist Dr. John Fernandez, who was later replaced by another orthopedist, Dr. David Gilbert. Dr. Gilbert eventually began charging a co-

pay of $10.00 per visit which the Claimant could not afford. The Claimant was also evaluated by a plastic surgeon and hand specialist, Dr. M. Felix Freshwater, whom the Employer/Carrier declined to pay for further treatment. Garcia alleges he injured his back and shoulder in a fall in the shower due in part to weakness in his left hand as a result of his work-related injury. He seeks authorization for evaluation and treatment of those injuries by an orthopedist, which the Employer/Carrier has denied. Garcia participated in a work hardening program, where he saw a psychologist who recommended ongoing psychological care. Thereafter he underwent treatment by a psychiatrist, Dr. Jack Greener, who eventually declined to treat him further, due to problems with authorization and payment by the Employer/Carrier, unless the Employer/Carrier would authorize a full year of treatment of 25 to 26 sessions. Thus the Employer/Carrier authorized and paid for some, but not all, of the medical care sought by the Claimant. The Employer/Carrier initially paid compensation benefits, but stopped those benefits in August 1999. As the parties were unable to resolve their differences before the Department of Labor Office of Workers' Compensation Programs ("OWCP"), the case was referred to the Office of Administrative Law Judges for hearing.

Garcia contends that he was improperly denied his free choice of physicians. He believes he has not yet attained maximum medical improvement. He seeks authorization for further treatment of his hand by Dr. Freshwater, and psychiatric treatment by a psychiatrist of his choice, as well as payment of past medical bills. He also seeks authorization for orthopedic evaluation and treatment of his shoulder and back. He also contends that his compensation benefits were paid at too low a rate, and terminated prematurely.

The Employer/Carrier contends that Dr. Fernandez and Dr. Gilbert were Garcia's free choice physicians for his hand, and that it has authorized further psychiatric treatment by Dr. Greener. It contends that Garcia reached maximum medical improvement of his hand by March 13, 2000, and that permanent partial compensation benefits for his hand are confined to the schedule under Section 8(c) of the Act. It argues that Gonzalez' complaints of pain and limitations in his use of his hand are exaggerated and inconsistent with his daily activities. It takes the position that any injury to Garcia's back or shoulder from the alleged fall in the shower is not covered by the Act. It contends that although Garcia has not yet reached maximum medical improvement for his psychiatric complaints, he has suffered no loss of earning capacity from that impairment. It accedes to Garcia's calculation as to his average weekly wage before his injury. Finally, it contends that it has established the existence of suitable alternative employment beginning in August 1999, and that Garcia failed to diligently seek work.

## ISSUES

The issues before me are:

1. What injuries are compensable.

2. Whether the Claimant has reached maximum medical improvement.

3. The nature and extent of the Claimant's disability.

4. Whether there is suitable alternative employment for the Claimant.

5. The extent of the Claimant's lost earning capacity.

6. What further medical treatment should be authorized.

7. Whether the Employer/Carrier is responsible for outstanding medical bills

8. Designation of the Claimant's free choice physicians.

Claimant's Pretrial Statement; Employer/Carrier's Pretrial Statement; Tr. at 35-47; Claimant's Closing Argument Brief; Employer/Carrier's Closing Brief. Although the Employer/Carrier initially contended that it was entitled to special fund relief pursuant to Section 8(f) of the Act, 33 U.S.C. § 908(f), that issue was withdrawn at hearing. Tr. at 6.[1] The Employer/Carrier initially posited a different average weekly wage than the Claimant, but later agreed to the Claimant's proffered figure. Employer/Carrier's Closing Brief at 41.

## APPLICABLE STANDARDS

### Disability

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968); *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248, 251 (1988). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI). The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 60 (1985). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Louisiana Insurance Guaranty Assn. v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148, 156 (1989). A condition is permanent if a

[1]The transcriber of the transcript mistook "8(f) petition for relief" as "ADA petition for effort." Tr. 6, line 11.

claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18, 21 (1982), or if his condition has stabilized, *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446, 447 (1981).

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a prima facie case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89, 91 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171, 172 (1986).

Once the prima facie case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *P&M Crane*, 930 F.2d at 430; *Turner*, 661 F.2d at 1038; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991).

The claimant may still establish total disability, however, if he establishes that he diligently tried and was unable to secure such employment. *Palombo*, 937 F.2d at 73; *Roger's Terminal and Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 691 (5th Cir. 1986).

Medical Treatment and Expenses

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a); 20 CFR §§ 702.401, 702.402. In general, the employer is responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 991 F.2d 163 (5th Cir. 1993); *Perez v. Sea-Land Services, Inc.*, 8 BRBS 130, 140 (1978). The Board has interpreted this provision broadly. *See, e.g., Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86, 94-95 (1989) (holding employer liable for modifications to claimant's house as medical expenses).

Pursuant to Section 7(b) of the Act, an employee has a right to choose an attending physician authorized by the Secretary to provide medical care. 33 U.S.C. § 907(b); 20 CFR § 702.403. When a claimant wishes to change treating physicians, the claimant must first request consent for a change and consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for and appropriate to the proper care and treatment of the compensable injury or disease. 33 U.S.C. § 907(c)(2); 20 CFR § 702.406(a); *see*

*Armfield v. Shell Offshore, Inc.*, 25 BRBS 303, 309 (1992); *Senegal v. Strachan Shipping Co.*, 21 BRBS 8, 11 (1988). Otherwise, an employee may not change physicians after his initial choice unless the employer, carrier, or deputy commissioner has given prior consent upon a showing of good cause. 33 U.S.C. § 907(c)(2); 20 CFR § 702.406(a).

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Stipulations

The parties were able to reach the following Stipulations:

1. The parties are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 et seq.

2. An employer-employee relationship existed at the time of the injury.

3. On June 9, 1998, the Claimant sustained an injury that arose out of and in the course of his employment.

4. A timely notice of the injury was given by the Claimant to the Employer.

5. The Claimant's average weekly wage at the time of injury was $845.56.

*See* the parties' Pretrial Statements; Claimant's Closing Argument Brief at 7; Employer/Carrier's Closing Brief at 41. Although coverage under the Act cannot be conferred by stipulation, *Littrell v. Oregon Shipbuilding Co.*, 17 BRBS 84, 88 (1985), I find that such coverage is present here. I have carefully reviewed the foregoing stipulations and find that they are reasonable in light of the evidence in the record. As such, they are hereby accepted as findings of fact and conclusions of law.

### Admissions

The Employer/Carrier made the following Admissions:

1. Dr. J. J. Fernandez was the Claimant's free choice physician.

2. Dr. David Gilbert is the Claimant's free choice physician.

3. The Employer/Carrier obtained a psychiatric IME with Dr. Arnold Zager.

4. Prior to June 27, 2000, the Employer/Carrier did not authorize Dr. Greener or any other psychiatrist to provide psychiatric care.

5. Prior to December 10, 1999, the Employer/Carrier specifically advised the Claimant in writing of his rights and ability to make a "free choice" of a treating physician.

6. The Carrier issued an LS-207 on April 6, 2000, stating in part: "We will continue to stand on our controversion of psychiatric care."

*See* Claimant's Request for Admissions and Employer/Carrier's Response to Request for Admissions, EX 22. These admissions are conclusively established as there has been no motion to withdraw or amend them. *See* 20 CFR § 18.20(d).

Summary of the Evidence

Garcia was deposed on March 9, 2001, EX 6, and also testified at hearing, Tr. 155-227. He was born in Honduras on October 16, 1966, and was 34 years old on the date of the hearing. Although he is more fluent in his native language, Spanish, he felt comfortable testifying in English. He attended school for six years in Honduras until he was 13 or 14, which is the regular period of schooling, after which he trained as a diesel mechanic, sheet metal worker and welder at a vocational school, from which he received a diploma after a year and a half. He attempted secondary school, but only went the first year. He came to the United States in 1984 or 1985 at age 16 or 17. His first job in the U.S. was as a welder. Then he worked as a diesel mechanic for two Mercedes dealerships. He was also self-employed in body shop work. He took an additional 600 hours of training in diesel mechanics from Kit Powers, a school in Miami. He also earned a certificate in automobile air conditioning from S&H. He began working for Sun Terminals in 1994, where he worked as a diesel mechanic until his accident on June 9, 1998. He had no language problems on the job. The employees primarily spoke Spanish. He studied for a GED on two occasions, in 1987 and 1999, but never took the examination. He said in 1999, he could not concentrate because of pain and swelling in his hand, and trouble sleeping. Based on his education and experience, he believes he would qualify as a lead mechanic, with two or three other mechanics working under him. He is right-handed.

At the time of the accident, Garcia was making $11.00 per hour plus overtime. On average, he earned between $800 and $900, depending on the overtime. In 1997, he earned $43,973.00. *See* EX 19 and 27.

The day of the accident, he was trying to open a 55 gallon container of oil. First he used the usual tools, but the top was frozen and would not open. Then he tried to open it by hitting a chisel with a sledge hammer, but he slipped on oil on the ground, lost his balance, and hit his left hand instead. He reported the injury to his supervisor, and was sent to the Sunshine Medical Center a block-and-a-half away. Then the company referred him to Dr. John Fernandez at the Broward Clinic in Fort Lauderdale. Garcia requested to see a doctor in Miami, where he lived at the time, but the company told him it would pay for the mileage to see Dr. Fernandez. When Dr. Fernandez left the clinic, Dr. Gilbert took over. Eventually Garcia stopped going to Dr. Gilbert when he wanted to charge him $10.00 for each visit. He did not recall missing any appointments

before that. As far as Garcia knew, Dr. Gilbert was not recommending any additional treatment or therapy for his hand the last time he saw Garcia. The medical evidence is discussed in detail below.

Dr. Gilbert referred Garcia to a work hardening program. In a Notice of Controversion dated July 8, 1999, the Carrier disputed disability from June 10, 1999 to July 4, 1999, alleging that Garcia was non-compliant with Dr. Gilbert's treatment recommendation. CX 3. Garcia testified that he entered the program as soon as he was called that an appointment had been set. He went every day for a month or more, except for one or two sessions that he missed. He said he called if he was going to miss a session. Based on the records from the work hardening described below, I conclude that Garcia was compliant with the work hardening program.

During the work hardening program he saw a psychologist five or six times. He felt he needed to be treated by a psychologist or a psychiatrist, because he was having a hard time controlling himself. He could not sleep. He was depressed and angry. He did not realize he needed treatment until the evaluator at the work hardening program told him he did. The Carrier did not authorize such treatment. Eventually his attorney referred him to Dr. Jack Greener, whom he saw five or six times. Dr. Greener prescribed medication. Garcia believed Dr. Greener was helping him.

The Carrier asked him to see another psychiatrist, Dr. Zager. Dr. Zager interviewed him, but did not treat him. Dr. Zager told Garcia to return to Dr. Greener for treatment. When he tried to return to Dr. Greener, Dr. Greener told him he had not been approved for further treatment by the Carrier, so he would have to wait. On cross examination, Garcia did not recall whether he ever saw the letter dated April 5, 2001, EX 24, authorizing Dr. Greener to continue treating him.

At the hearing, Garcia was wearing a wrist band on his left wrist. The band was prescribed by a doctor who examined Garcia in connection with his application for Social Security disability. He was also seen by Dr. Ress at the Carrier's request, and by Dr. Freshwater. Dr. Freshwater recommended further treatment or surgery. Garcia said he can use his left hand, but he is in constant pain, so he would rather not. He also feels numbness and tingling in his hand, which is sometimes hot and sometimes cool, and swells after he does anything. He can drive a car; he owns a Toyota truck. Sometimes he has problems with his hand when he is driving. He likes to play soccer with his son, and goes fishing. He would like to have further treatment of his injury, because he does not feel he is one hundred percent of what he used to be.

Garcia testified that in addition to his hand injury, he has pain in his whole arm, his neck, and his lower back, about which he complained from the very beginning. On cross examination, he said he told Sunshine Medical, Dr. Fernandez, Dr. Gilbert and Dr. Zidel about the pain in his low back. He said he complained of left shoulder problems two or three days after the accident. The Carrier never authorized any treatment for his back and shoulder. He also said he has headaches, especially when he uses his hands and has pain. He told Dr. Gilbert about his

headaches. He also reported a fall in the shower to Dr. Zidel. He was afraid to put his left hand out to catch himself, so he hit his left shoulder. He thought that happened in 1998 or 1999, before he went to the work hardening program.

Garcia said that he loved working at Sun Terminals. No one from Sun Terminals ever offered him any type of work after his injury. He did not know why he was not offered work. He said he is not working because no one will hire him. He had had no job or income after June 1998. He said he went back to Sun Terminals many (five or six) times seeking light duty work, the last time about six months after the accident. He said he and the insurance company spoke to his supervisor, Stefanos Garcettas, and Juan Gonzalez, who said they did not have light duty for him. Garcia said that he thought he could work as a lead mechanic, or group leader. He said he had gone to more than 15 or 20 places in the last years seeking work. He applied for Social Security disability which was denied, and on appeal. Garcia testified that compensation benefits stopped after July 1999. His testimony was confirmed by the record of indemnity payments, which showed he was paid compensation for June 10, 1998 to July 2, 1999, and July 28 to August 10, 1999. EX 18. Garcia did not know why the benefits were cut. He was in the process of buying a house when the accident happened. Eventually he lost the house in foreclosure. *See* EX 19 and 20.

The Employer/Carrier retained a private investigator, Robert Edward Chamblin, Jr., to conduct surveillance of Garcia. Chamblin testified at the hearing. Tr. 227-252. He was trained by Equifax Retail Credit from 1975 to 1978, and then became a private investigator in 1979, conducting background investigations, surveillance investigations, locations, witness statements, and things of that nature. Chamblin took still photographs and 12 minutes of videotape of Garcia, whom he identified at the hearing. EX 17; EX 25 A-E; EX 26 A-D. EX 26 A, a video taken in March 2000, showed Garcia walking around and driving his truck. EX 26 B, a video taken on May 23, 2000, showed Garcia driving to Dr. Zager's office. EX 26 C, a video taken on October 9, 2000, showed Garcia going to a laundry, and later returning home. Chamblin testified that on that occasion, Garcia was wearing a sweat band on his left wrist, but not a brace. Chamblin testified that Garcia carried a "very small plastic bag with his left hand and a large plastic bag with his right," and that he observed Garcia using both hands to move laundry about and drive. Tr. at 245. When shown Chamblin's still photographs, EX 25A-E, also taken October 9, 2000, Garcia agreed that the pictures were of him, and that he was holding his cell phone and a blanket with his left hand. EX 26 D, a video taken on February 8, 2001, showed Garcia driving his truck and opening the truck door with his left hand.

The Employer/Carrier relied on labor market surveys by Claire Lange to establish the existence of suitable alternative employment. The Claimant also called Lange as a witness. Her testimony is summarized below.

Counsel for the Claimant deposed Nadja Kross, controller for Sun Terminals, who gave testimony based on Garcia's personnel records. CX 9. Garcia was hired on October 3, 1994. His records showed that he was considered to be on leave of absence. His last paycheck for

December 1998 showed that he was paid for four weeks' vacation on December 23. Records did not reflect any offers of light duty employment to Garcia after the accident in June 1998. Kross testified that at the time of her deposition in January 2001 that there was a lot of available light duty work doing paperwork. She did not know why no light duty work had been offered to Garcia. Such work is usually arranged with supervisors of the affected facilities.

The Employer/Carrier's payments for medical expenses and compensation are listed in EX 18. The Employer/Carrier calculated Garcia's compensation based on an average weekly wage of $752.24, with a compensation rate of $501.49, rather than the $845.56, with a compensation rate of $563.71, stipulated at hearing. *See* the Employer/Carrier's Pretrial Statement. The Employer/Carrier paid temporary total disability compensation to Garcia in the total amount of $30,805.80 for the periods from June 10, 1998 to July 2, 1999, and July 28 to August 10, 1999. The Employer/Carrier did not pay compensation for the period from July 3 to July 27, 1999, and paid no compensation after August 10, 1999.

## Medical Evidence

For the first month after his injury, Garcia was treated at the Sunshine Medical Center. The records are found in EX 8. X-ray revealed one or two tiny metal foreign bodies and dorsal soft tissue swelling, but no fracture or dislocation. The diagnoses were left hand trauma and sprain. Work status reports indicated that Garcia could perform light duty work if it was available, but restricted him from any use of his left hand. On June 22, after examination revealed that the hand had severe edema, was warm to touch and tender to palpation, one of his doctors at Sunshine requested that Garcia be referred to a hand specialist.

Garcia was referred to Broward Orthopaedic Specialists for further treatment. Dr. John Fernandez first saw Garcia on July 6, 1998. His treatment notes appear in EX 14. He diagnosed left wrist and hand pain and arthrofibrosis, and possible reflex sympathetic dystrophy ("RSD"). Garcia was enrolled in a therapy program. He also began to complain of shoulder problems. On August 3, Dr. Fernandez added a diagnosis of left shoulder pain, possible RSD/frozen shoulder syndrome versus AC joint synovitis. A bone scan of the shoulders and hands taken August 5, 1998, demonstrated no significant abnormalities. Examination on August 10 disclosed tenderness and mild swelling in the shoulder. Dr. Fernandez imposed a no work restriction until the shoulder could be evaluated by Dr. Reilly.

Dr. David Gilbert took over Garcia's care on August 24, 1998, when Dr. Fernandez left the practice. Dr. Gilbert was deposed on August 7, 2000, EX 1, and October 5, 2000, EX 2. His notes also appear in EX 14. Dr. Gilbert is an orthopedic surgeon in practice since 1992, including three years of formal private practice. He became Board certified in September 2000. He limits his practice to wrist, hand and upper extremity surgery. Dr. Gilbert's initial impression was left hand crush injury with mild turret exostosis (bone thickening of the index metatarsal) and left shoulder pain, with AC joint synovitis and resolving RSD, improved since last visit. Dr. Gilbert felt another partner, Dr. Michael Reilly, was better qualified to evaluate Garcia's shoulder

problem.

The purpose of Garcia's August 24, 1998, visit to Dr. Gilbert was to obtain a letter to assist Garcia in obtaining a mortgage to buy a home. Dr. Gilbert wrote that Garcia might be able to return to work in about two months. While his wrist range of motion was improving, he needed more range of motion therapy as well as strengthening of his shoulder and hand. Based on the normal bone scan, which would have revealed any areas of inflammation secondary to a fracture, reflex sympathetic dystrophy, infection or other causes not readily identifiable on standard x-rays, Dr. Gilbert thought Garcia's complaints were out of proportion to his objective findings.

At the September 23, 1998, visit, Garcia was doing well. He was using his hand for activities such as washing his car. Dr. Gilbert thought Garcia could return to work with a 15 pound weight restriction and no overhead activities until his shoulder was evaluated. Dr. Gilbert testified that eventually Dr. Reilly was authorized to treat the shoulder. The record does not contain treatment notes from Dr. Reilly. Thereafter, however, Dr. Gilbert no longer included the shoulder in the "impression" section of his treatment notes, although he occasionally mentioned it in his notes. During his deposition, Dr Gilbert described Garcia as compliant with therapy, but said he was "unimpressed with [Garcia's] motivation to really get well." EX 1 at 10.

On October 7, 1998, Garcia reported a sudden decrease in sensation in his index finger. Two point discrimination on examination was abnormal in a way that was unusual and difficult to explain based on his history (5 mm on all digits except for the index and thumb, 8mm on the thumb, and 15 mm on the index finger). Dr. Gilbert stated in his treatment notes that Garcia could return to work with no overhead use of the left hand, and a weight limit of 15 lbs in the left hand, the same limitations as he had assessed on September 23. Dr. Gilbert recommended a nerve conduction study which was conducted on October 14, with normal results. EX 11.

The Employer/Carrier referred Garcia for an independent medical examination by Dr. Paul Zidel on October 15, 1998, to make findings and diagnoses, and to determine which diagnoses were related to the job injury, the cause of Garcia's shoulder complaints, whether Garcia needed further treatment with regard to the job injury, whether he could resume normal activities with or without restrictions, an estimation of the date of permanent status, and an assessment of the extent of any permanent disability. Dr. Zidel's notes appear in EX 10. Garcia reported the June 1998 injury to his hand, and a fall in the shower injuring his shoulder in early August. Results of the nerve study were not yet available. On examination, there was swelling in the hand. There was some decreased sensation, no active signs of RSD, and full range of motion. Dr. Zidel diagnosed left hand crush injury with exostosis and fibrosis and neuropathy, and tendinitis. He needed to obtain the nerve studies. Based on Garcia's records he said there was some question of early RSD although he did not see any evidence of it. He observed that overall Garcia's function was improving. He said he would recommend surgery if the nerve studies showed significant compressive neuropathy. Dr. Zidel recommended conservative non-operative treatment and a more aggressive conditioning program. He felt Garcia "has the potential" to resume activities

without restriction. Dr. Zidel concluded that Garcia's shoulder was not related to the original injury. In an addendum dated December 22, 1998, Dr. Zidel indicated that he had reviewed the nerve studies, which had normal results with no evidence of neuropathies or entrapment. Therefore he did not recommend surgery.

Garcia returned to Dr. Gilbert's office on October 28, 1998. Garcia was doing well with nonsteroidal anti-inflammatory medications for his shoulder. His left hand was not making any more significant improvements. The two point discrimination had returned to normal. Dr. Gilbert testified that the normal results of the nerve conduction study were inconsistent with the two point discrimination results on October 7. Dr. Gilbert concluded that Garcia could return to work with the restrictions he had set on October 7.

Garcia returned to see Dr. Gilbert on November 12, 1998, at the recommendation of the hand therapist, who observed color and temperature changes in his hand during therapy. Blood flow to the hand seemed a bit sluggish. Dr. Gilbert recommended additional studies, including doppler and blood pressure and blood flow studies to rule out a vascular problem.

When Garcia returned on December 17, 1998, not all the studies had been performed because of their limited availability in the area. A local anesthetic block suggested that a surgical sympathectomy might alleviate Garcia's pain and improve blood flow to the hand. Before recommending surgery, however, Dr. Gilbert referred Garcia for a more involved Doppler examination, which demonstrated no significant architectural abnormality, confirming his recommendation for surgery on the nerves.

Dr. Zidel reviewed Garcia's records and saw him again on January 28, 1999, at the request of the Employer/Carrier. Although a letter from the Carrier requesting the consultation asked similar questions as the previous letter of referral, Dr. Zidel appears to have treated the visit as a request for a second opinion on the surgery proposed by Dr. Gilbert. Dr. Zidel said he did not feel the surgery to be "unreasonable."

Dr. Gilbert performed the surgery on April 2, 1999. EX 14 and 16. In addition to sympathectomy of the fingers and wrist, at Garcia's request, the exostosis was removed. Garcia did well after the surgery. He had no discoloration and was using his wrist to work around the house. He did complain of decreased sensation in all his fingers. On April 28, 1999, Dr. Gilbert said Garcia could return to work with a three pound weight restriction for his left wrist. On May 13, 1999, Dr. Gilbert recommended that Garcia could return to work with a ten pound restriction on the use of his left wrist. He also recommended a functional capacity evaluation.

The functional capacity evaluation was completed at HealthSouth Rehabilitation on May 21, 1999. EX 9. The evaluator described Garcia's previous job as "very heavy," requiring lifting over 100 pounds occasionally, 50 pounds frequently, and 20 pounds constantly. The report indicates that Garcia gave maximum effort, and that symptom magnification was "not applicable." The evaluator concluded that active range of motion, strength, sensation, functional motor and

upper extremity endurance were all limited, and that Garcia could work in the "light" physical demand category. Maximum safe carry was listed at 25 pounds, and for one wrist, 10 pounds on the left, and 45 pounds on the right. Garcia's current capabilities did not meet the demands of his previous job. The evaluator stated that Garcia might benefit from vocational exploration and/or work conditioning if the goal was to improve his level to higher than "light" work to improve his work options.

Dr. Gilbert met with Garcia on June 10, 1999, to review the results of the functional capacity evaluation. Physical examination showed good range of motion. Two point discrimination remained highly inconsistent, with unexplainable loss of sensation of the thumb, where it had not been affected by the surgery. Garcia's fingers had normal color, and there was no return of the exostosis.

Garcia began participating in a work hardening program at HealthSouth Rehabilitation on July 2, 1999. EX 9 and 12. The Employer/Carrier stopped paying Garcia compensation and filed a Notice of Controversion dated July 8, 1999, CX 3, disputing disability on the basis that Garcia was non-compliant with work hardening. The Employer/Carrier did not explain its reason for the claim of non-compliance at the hearing. Based on the final report described below, however, I do not agree that Garcia was non-compliant.

Garcia returned to Dr. Gilbert on July 15, 1999. Garcia reported his sensation had improved. His wrist was warm and well-perfused, a normal finding. Dr. Gilbert anticipated that Garcia would complete the work hardening program, after which he would be assigned an impairment rating and permanent work restrictions based on the recommendations of the people who administered the work hardening. However, Dr. Gilbert did not see Garcia again until eight months later.

A psychosocial evaluation completed on July 16 as part of the work hardening program described Garcia as depressed and anxious, with limited coping abilities in his situation. The psychologist thought the work hardening program would help Garcia reduce depression and anger and learn to manage pain more effectively. He also recommended medical evaluation for a trial period of antidepressant medication.

Garcia completed the work hardening program on August 2, 1999. He attended 19 out of 20 sessions. His attendance was "good," and his motivation "fair." Garcia did not meet the goal of working in the "medium" physical demand level due to complaints of pain. He was able to lift 20 pounds from the floor with both wrists, the "light" physical demand level. The physical therapist did not believe Garcia would be able to return to his former job. Garcia was advised to return to his physician to discuss returning to work.

Garcia's compensation payments resumed from July 29 to August 10, 1999, but then stopped again, EX 18. On August 20, 1999, the Employer/Carrier prepared another Notice of Controversion which stated:

1. Claimant failed to keep appointment with attending physician.
2. Claimant has reached Maximum Medical Improvement and can return to work at job of injury.
3. Nature and Extent of any disability is unknown.

CX 4. Again, the Employer/Carrier offered no explanation of these assertions at hearing. The record is silent as to why Garcia did not return to visit Dr. Gilbert after he completed the work hardening program. I find no evidence, however, that Garcia failed to keep an appointment with Dr. Gilbert in August 1999. Furthermore, the reports from the functional capacity evaluation and the work hardening program both stated that Garcia could not return to his prior job, a conclusion on which Lange relied. Thus the Employer/Carrier's unilateral decision to stop paying disability compensation of any kind was not justified by the evidence in the record.

Garcia first saw Dr. Jack Greener, a psychiatrist, on December 10, 1999, on referral by his attorney for a psychiatric evaluation. Dr. Greener was deposed on January 10, 2001. JX 5. His report, progress notes, and other records were made exhibits to the deposition, and some of his progress notes also appear in EX 13. Dr. Greener is board certified, and has been practicing psychiatry since 1974. Dr. Greener reviewed Garcia's medical records before examining him. Dr. Greener attempted to administer the MMPI, but discovered that Garcia's reading skills were so poor that he did not understand many of the questions, rendering the test results invalid. During his deposition, he testified that he thought Garcia had grade 4 or 5 conversational ability, and knew technical terminology to work in his mechanical field, but did not have knowledge of the innuendoes of the English language, resulting in his high F score. He also thought a "plea for help" may have contributed to the score. Based on his interview of Garcia, Dr. Greener diagnosed major depressive disorder, single episode, severe, and obsessive compulsive personality. Dr. Greener prescribed medication for depression and sleep problems, and recommended immediate psychiatric and psychological treatment to avoid deterioration. In his report and during his deposition, Dr. Greener opined that Garcia's depression was caused by his inability to work due to his accident.

Dr. Gilbert saw Garcia on March 13, 2000 for the last time. Garcia continued to complain of some pain, and also mentioned depression. On examination, Garcia could make a good fist, indicating excellent mobility of his fingers. Two point discrimination was somewhat erratic but appeared to be intact. The wrist was warm and well-perfused. All incisions were healed. There was no inflammation and no sign of any recurrence of exostosis. Garcia had good mobility of his wrist and forearm, but complained of non-specific pain involving the entire left upper extremity. Although the treatment notes showed a diagnosis of RSD, Dr. Gilbert testified that there was no sign of RSD.

Dr. Gilbert initially assessed Garcia's impairment under the Florida Uniform Impairment Rating Schedule. On May 8, 2000, he assigned an impairment rating under the 4th edition of the AMA guidelines of 0% impairment of the fingers and upper extremity based on good range of motion and normal sensation. Dr. Gilbert further testified, "The guide does allow for some

amount of leeway regarding subjective complaints of pain and I believe that this patient does sincerely believe he has pain and felt that it would be appropriate to provide him that amount of leeway of 2% of the whole person regarding that . . . particular issue." EX 1 at 32. Dr. Gilbert did not assign any separate rating for RSD as provided by the AMA guidelines because Garcia did not demonstrate any significant evidence of RSD at the time of the exam. He did not agree that there were any objective signs of RSD, such as muscle atrophy described by an occupational therapist in the work hardening report. Autonomic nerve system disease or RSD would be retained in Garcia's diagnoses because "it is important to know there is a previous history of RSD." EX 2 at 11. Dr. Gilbert's notes indicate he expected to continue to see Garcia on an "as needed" basis. Dr. Gilbert also reiterated recommended referrals to a psychologist to help Garcia adjust to the consequences of his injury, with possible follow-up by a pain management physician.

In addition to assigning the impairment rating, Dr. Gilbert filled out a form indicating that Garcia's date of maximum medical improvement was March 13, 2000.[2] He also assigned permanent work restrictions limiting Garcia to "light" work, lifting and carrying up to 10 pounds frequently, and 11 to 20 pounds occasionally, based on the reports from the functional capacity evaluation and the work hardening program. He marked that Garcia could frequently bend, squat, crawl, climb and reach above shoulder level, and that he could use his hands and feet for repetitive movements. He assigned no other restrictions. When asked why he assigned a 20-pound weight restriction, when the work hardening report noted only 5 pounds with the left hand, Dr. Gilbert said that the 20-pound restriction was a total restriction for lifting with both hands. He testified that he also took into account that Garcia was "less than forthright" as to his abilities. EX 2 at 9. He further testified that he nonetheless recommended evaluation by a pain management specialist because "perhaps his less than forthright behavior is unintentional. I happen to believe that Mr. Garcia suffers from pain. I do not believe that I can help him with it." EX 2 at 14. While the 2% impairment of the whole body was based on Garcia's subjective complaints, the work restrictions were based "in large part on his functional capacity evaluation and work hardening recommendations." EX 2 at 15. Dr. Gilbert did not believe that Garcia could safely return to full duty.

Dr. Greener saw Garcia again on April 10, 2000, this time for treatment at the request of his counsel. Dr. Greener observed that Garcia remained depressed, gave him some medication, and was to see him again in a couple of weeks. However, when Garcia appeared for his next appointment on May 5, his counsel had determined he would not fund treatment, and Garcia left after being told he would be financially responsible.

The Employer/Carrier referred Garcia to Dr. Arnold Zager for an independent psychiatric examination on May 23, 2000. In his report, EX 3, Dr. Zager characterized Garcia as "cooperative" and "dramatic." Dr. Zager reviewed Garcia's medical and mental health records, and conducted a clinical interview. Dr. Zager diagnosed pain disorder due to physical and psychological causes, and an adjustment disorder with depressed and anxious mood. He thought

[2]This and other forms Dr. Gilbert filled out mistakenly referred to Garcia's right hand.

Garcia magnified complaints "possibly for ongoing litigation and the patient certainly does appear to be histrionic and dramatic. That is not to say that he is malingering, but there appears to be a supratentorial contribution to his ongoing complaints." Dr. Zager recommended short-term psychiatric intervention in the range of four months coupled with trials of antidepressant medication, followed by "reappraisal of his motivation as well as clinical change." Psychiatric treatment was authorized about June 27, 2000. *See* confirming letter from counsel dated July 6, 2000 in JX 5. In an addendum to his report dated July 5, 2000, in response to questions posed by counsel for the Employer/Carrier, Dr. Zager stated that Garcia's psychiatric condition did not preclude him from working, and again recommended short term treatment in the range of four months. After the Employer/Carrier received the addendum from Dr. Zager, the authorization was limited to two visits per month for four months, or eight visits. Thereafter, Garcia saw Dr. Greener for treatment from July to November 2000.

Dr. Greener's July 17 progress note described Garcia as depressed with fragmented sleep, an 18 pound weight loss, and tearful. Garcia told Dr. Greener he had attempted to find work without success, and that his former employer refused to hire him stating they cannot take responsibility if he is injured again. Garcia had no funds for prescriptions, so was given some free samples of Celexa and advised to consult his attorney to work on a method of obtaining prescription medicine.

When he returned on July 26, Garcia told Dr. Greener he had no health insurance, the people from work had cancelled him, and he was unable to fill his prescription for Neurontin. He was again given samples of Celexa. Garcia said he would look into Social Security disability.

On August 9, Garcia reported he had been given authorization to receive prescribed medications and had filled prescriptions for both Neurontin and Celexa. Dr. Greener described him as "still very depressed and negativistic." Dr. Greener encouraged him to involve himself with vocational rehabilitation and to continue with his medication.

Progress notes for August 23, September 6, and September 27 were similar. It was unclear whether Garcia had actually applied for Social Security disability, or become so discouraged by what he was told that he left without applying. Dr. Greener encouraged Garcia to be as active as he could and look into possibilities for work, as well as to attempt to deal with Social Security.

Dr. Gilbert confirmed that Garcia attempted to make additional appointments with him in September 2000 but had been told by the office staff that he was responsible for a $10 co-payment once he had attained maximum medical improvement. Dr. Gilbert had initially assessed Garcia's impairment rating and MMI under Florida workers' compensation procedures. He later revised the impairment rating pursuant to AMA guidelines when requested by the Carrier. Claimant contends, and I find, that application of the co-payment requirement and other Florida workers' compensation standards was erroneous, as the claim was properly brought under the LHWCA.

On October 3, 2000, after receiving notification that Dr. Greener's office had received no payment since July 17 despite prompt submission of claims, Garcia's counsel wrote to counsel for the Employer/Carrier to complain that despite authorization, Dr. Greener was not being paid in a timely manner. Copies of checks payable to Dr. Greener in JX 5 indicate that payments were issued beginning September 29. Dr. Greener testified that he was eventually paid for all but one of the sessions with Garcia.[3]

Garcia saw Dr. Greener two more times. Dr. Greener continued to describe him as very depressed. On October 18, Garcia reported that when he tried to change the spark plugs on his girlfriend's car, his entire hand swelled up. On November 8, Garcia reported having been evaluated at a clinic for Social Security. He felt hounded by the worker's compensation company, which had notified Dr. Greener that authorization for continued treatment was being withdrawn. According to the Employer/Carrier's LS-207 dated November 7, CX 8, authorization was withdrawn because Garcia refused to attend another independent medical examination. After Garcia was notified the Employer/Carrier had withdrawn authorization, he did not attend his November 22, 2000, appointment with Dr. Greener. Dr. Greener believed Garcia would have benefitted from further treatment. He thought by October Garcia was starting to feel better, but said it was a struggle all along because Garcia would stop taking medication when the Carrier would not pay for it.

On November 21, 2000, and January 4, 2001, Garcia underwent examination by Dr. M. Felix Freshwater as requested by Garcia's counsel. Dr. Freshwater was deposed on June 29, 2001; his report appears as an exhibit to the deposition. JX 21. Dr. Freshwater is a board certified plastic surgeon and has been board certified in hand surgery since 1990. Dr Freshwater has published, lectured and taught courses about impairment ratings of the hand. Dr. Freshwater reviewed Garcia's medical records. On examination, Garcia had excess sweating in his left upper extremity, which was cold compared with the right. There was duskiness on the back of the hand. Testing disclosed that joint motion in the left hand and wrist and grip strength were all reduced and essentially the same as at the functional capacity evaluation in May 1999. X-ray showed demineralization consistent with the clinical appearance of RSD. Dr. Freshwater diagnosed RSD, and testified that Garcia would need continuing care for his hand, including treatment for pain. Garcia was taking Neurontin and Celexa, and Dr. Freshwater thought other medications might be needed. As RSD is due to irritation of the median nerve, despite the normal nerve conduction study, Dr. Freshwater stated he would consider performing decompression of the median nerve at the wrist to help alleviate pain.

In his report, Dr. Freshwater placed some permanent work restrictions which were different than Dr. Gilbert's, including not being exposed to vibrating machinery, tools and equipment or temperatures under 68 degrees, and limiting Garcia to one-handed work. Dr.

---

[3]Although Dr. Greener testified that he had not been paid for one session with Garcia, the Employer/Carrier's records show that Dr. Greener was paid through November 8, 2000, his last session. EX 18. See additional discussion below.

Freshwater observed that Dr. Gilbert's restrictions were to use of Garcia's right hand upper extremity rather than his injured left, which made no sense. Dr. Freshwater said Garcia would be unable to generate 20 pounds of force without excruciating pain. Being worse when it is cold is typical for patients with crush injuries. Vibration is another irritation for patients with RSD. Dr. Freshwater assigned a 30% impairment rating due to Garcia's loss of strength, based on the AMA Guide. He testified that there was no basis in the AMA Guide for awarding 2% for subjective pain as Dr. Gilbert had done, and that the 0% rating for objective findings given by Dr. Gilbert is not logical when work restrictions are assigned. He believed that Dr. Gilbert's 2% rating for pain may have been based on Florida ratings. As the functional capacity evaluation demonstrated maximal effort, and he found similar measurements, Dr. Freshwater believed the 30% rating was justified. He also assigned a 22% impairment from digit stiffness, which is a 20% impairment of the extremity, and 11% from wrist stiffness, added to the 30% for loss of strength, resulting in a 50% impairment to the extremity, or a 30 % impairment of the whole person. He gave no separate rating for pain. On cross examination he described how he measured each aspect, and explained the basis for his conclusion that Garcia had given maximum effort on the tests.[4]

Dr. Freshwater also disagreed with Dr. Gilbert's finding that Garcia's RSD had resolved. Dr. Freshwater stated that Garcia had all four cardinal signs and symptoms of RSD as listed in the AMA Guide. He stated that the pressure band on the wrist which Garcia wears may be providing relief by decompressing his carpal tunnel, an effect similar to the surgery he recommends.

Dr. Freshwater testified that one of his staff had translated his questions to Garcia into Spanish, and Dr. Freshwater understands Spanish, though he does not speak it well. He did not go into details of Garcia's mental condition as he is not a psychiatrist, and Garcia told him he was under psychiatric care. The only potential hindrance to Dr. Freshwater's examination was the fact that Garcia was taking medication which would lessen the signs and symptoms of RSD. Asked about the surgery performed by Dr. Gilbert, Dr. Freshwater stated that sympathectomy helps some patients permanently, but for some it is temporary because the nerves have a tendency to regrow. Asked whether Garcia reported pain in his shoulder, Dr. Freshwater said he complained of pain radiating to the shoulder.

Garcia was examined by Dr. Zager a second time on March 27, 2001. The report appears at EX 29. Dr. Zager reviewed his own previous report, and Dr. Greener's records and deposition. Garcia reported that he had been treated by Dr. Greener, but treatment was no longer authorized, and he had run out of Celexa and Neurontin in January. Garcia said the medications had helped his sleep pattern and made him more relaxed and less irritable. Garcia reported physical distress in his left upper extremity, back, left shoulder and neck. Dr. Zager agreed with Dr. Greener that Garcia's limited reading comprehension rendered the MMPI invalid. Dr. Zager

---

[4]Because I find below that Garcia has not yet reached MMI, I conclude that any rating of permanent partial impairment is premature. Nonetheless, I credit Dr. Freshwater's testimony that Dr. Gilbert's impairment rating was not assessed in accordance with the AMA Guides to the Evaluation of Permanent Impairment, 4th Edition.

described Garcia as cooperative to the interview, but irritable and frustrated about his life predicament, injury, and the Carrier. Dr. Zager again diagnosed pain disorder due to psychological and physical cases, and said Garcia continued to manifest a mood disorder secondary to the work injury, which, in view of its duration, Dr. Zager diagnosed as mild chronic depression or dysthymic disorder. Dr. Zager recommended that treatment with Dr. Greener and medication continue. Dr. Zager said that Garcia was not psychiatrically disabled from gainful employment. Dr. Zager anticipated that Garcia would reach psychiatric maximum medical improvement within two to three months.

Dr. Andrew Ress, a surgeon specializing in plastic and hand surgery, conducted an independent medical examination on April 9, 2001. His report can be found in EX 4. Dr. Ress recounted Garcia's medical history relating to his left hand, stating his symptoms included swelling, tingling, numbness and burning, which had improved after surgery, but were worse by the time of the examination. Dr. Ress stated that Garcia was also complaining of left shoulder, neck and back pain. On examination, which was limited to the upper extremities, Garcia had mild-to-moderate non-pitting (2+) edema. He had mild clubbing of the digits of the left hand, and generalized tenderness over the entire hand and digits. The hand was warm up to the digits, which were slightly cooler. Dr. Ress could not assess the active range of motion of the digits due to submaximal effort by Garcia. Sensation was present in radial, median and ulnar nerve distribution. Two point discrimination was approximately 8mm (5mm is normal according to Dr. Gilbert, EX 1 at 16). There was no tenderness on the forearm or elbow, and full range of motion at the elbow. Garcia's neck and back were not evaluated. Dr. Ress's impression was status post crush injury left hand, RSD stage 2, stable. Dr. Ress stated that Garcia's pain symptoms were consistent with RSD which has plateaued, and that he should be able to be employed. Dr. Ress recommended permanent restrictions of 20 pounds for both hands, 10 pounds for the left hand, and wearing a compressive garment to control edema. Dr. Ress assessed a permanent impairment rating of 10% for the hand, including a 9% rating for the upper extremity, primarily based on the subjective pain symptoms. Dr. Ress also said that Garcia would benefit from job retraining to a position that would be less dependent on use of his left hand.

Compensable Injuries

I conclude that the crush injury to Garcia's left hand was his only compensable physical injury. The injury to his shoulder appears unrelated to the work-related injury, as Dr. Zidel reported. It was most likely caused by a fall in the shower which occurred in late July or early August 1998, as described by Garcia in his doctors' treatment notes and his testimony. The shoulder injury was not a natural and unavoidable consequence of the injury to his hand. Moreover, there is no evidence in the file as to any injury to Garcia's back, or that the low back pain he complained of was in any way related to the injury to his hand.

Garcia also has a mental impairment, however, which is related to his hand injury. Although they gave different diagnoses, both Dr. Greener and Dr. Zager agree that Garcia has a

mood disorder as a result of the injury to his hand,[5] and that he is in need of further psychiatric treatment. As the Employer has pointed out, however, neither Dr. Greener nor Dr. Zager have opined that Garcia's mental impairment disables him from working. Indeed, during the time he treated Garcia, Dr. Greener consistently encouraged Garcia to take steps to find alternate employment. Thus I find that the Employer is responsible for the costs of treatment of Garcia's mental disorder, but that Garcia has no work limitations related to it.

Maximum Medical Improvement

Based on the medical evidence of record, I find that Garcia had not reached maximum medical improvement by the time of the hearing. Although Dr. Gilbert determined that Garcia had reached maximum medical improvement of his hand on March 13, 2000, later medical examinations showed that the improvement in his condition after surgery by Dr. Gilbert was only temporary. Dr. Gilbert testified that at the time of his last examination, there were no signs of RSD. Nonetheless, Dr. Gilbert recommended further treatment to address Garcia's pain. Both Dr. Freshwater, who examined Garcia in November 2000 and January 2001, and Dr. Ress, who examined Garcia on behalf of the Employer in April 2001, agreed that Garcia had signs and symptoms of RSD. Furthermore, although Dr. Ress described the RSD as "stable" and suggested that Garcia had "plateaued," Dr. Freshwater recommended further treatment, including possible surgery, to alleviate Garcia's symptoms. Similarly, both Dr. Greener, who treated Garcia's mental impairment, and Dr. Zager, who conducted independent medical examinations, agree that Garcia needed further treatment of his mood disorder.

Vocational Evidence

Claire Lange is a vocational rehabilitation counselor. She testified at the hearing, Tr. at 49-144, and produced case notes, correspondence, reports and job analyses, EX 7 and 28. She runs a company called "Lange Consulting and Development, Inc." She is a Certified Rehabilitation Counselor, a Certified Vocational Evaluator, a Certified Disability Management Specialist and a Certified Case Manager. She has a state provider's number to provide vocational services in the State of Florida workers' compensation system. She is also certified through the Office of Workers' Compensation programs of the Department of Labor. She was retained by the Carrier in June 1999 to assess Garcia's vocational abilities and his potential for returning to the labor market.

By letter dated July 9, 1999, Lange notified the Carrier that she had spoken with a representative of HealthSouth Rehability, "who stated that Mr. Garcia is pain focused and is giving sub-maximal effort in the work hardening program." Lange went on to state that she would provide HealthSouth "with vocational goals and required physical capacities so that the program is goal-focused."

---

[5]Dr. Zager also diagnosed pain disorder, which would also be related to the injury to the hand.

Lange met with Garcia on July 13, 1999. She did not do any testing. He told her he has a certificate as a heavy-duty diesel mechanic. His work history consisted of diesel mechanic, automobile mechanic, mechanic helper and welder, all of which gave him mechanical abilities, skills and knowledge. He knows how to use power tools, hand tools, and machine tools, welding, planing and cutting equipment, and jacks and hoists. Some of those skills are transferable to jobs requiring lighter exertion than his previous jobs. On July 19, 1999, Lange wrote to Dr. Gilbert requesting him to complete a work restriction evaluation specifying Garcia's physical limitations as the result of the injury to his left extremity.

In August 1999 Lange performed a transferable skills analysis based on Garcia's work history, which she entered into the computer, coded in accordance with the Dictionary of Occupational Titles. She also took into account the functional capacity evaluation and limitations assessed by HealthSouth. That analysis disclosed that Garcia could not return to any of his previous jobs based on his injury and resulting physical limitations. The computer search identified 24 possible occupations. She was able to identify several open positions within those occupations, about which she forward information to Garcia, including courier for Integrated Regional Laboratories on the 2:00 a.m. shift, at $7.00-10.00 per hour with a $.90 evening shift bonus; press machine operator for Eden Staffing for $5.50 per hour; vitamin blending production worker for Sentry Supplement Company for $6.00-10.00 per hour; driver for Enterprise Rent-a-Car for $6.00 per hour; guard for Barton Protective Service at $7.00 per hour; machine operator for On-Site Commercial Staffing fo $7.00 per hour; service advisor trainee for Miami Lincoln-Mercury on commission; service consultant for Lexus of Kendall on commission; telemarketer for Professionally Speaking for $7.00 per hour; and telemarketer for Krane Products for $5.15 per hour plus commission. In each case she contacted a representative of the employer and spoke to them about Garcia's limitations and the jobs she was seeking for him, and forwarded the information to Garcia for him to follow up.

The results of her assessment were reported to the Carrier on August 12, 1999. She provided information about the available positions to Garcia contemporaneously with her report. She also forwarded job analyses of the positions to Dr. Gilbert for him to signify whether the jobs could be performed within Garcia's physical limitations.

On October 8, 1999, counsel for Garcia wrote to Lange that Garcia contacted two of the listed locations, but that the person Garcia spoke to at Miami Lincoln-Mercury said there were no such jobs, and the other, Sentry Supplement Company, had only one opening which had been filled the first week of August. Lange replied on October 11, 1999, that Garcia had spoken to the wrong person at the car dealership, and that the other job was available when Lange made her initial contact, but she could not guarantee jobs' availability at the time of Garcia's contact "especially if some time has elapsed."

In a report to counsel for the Employer/Carrier dated April 20, 2000, Lange identified additional jobs available in the labor market which she thought Garcia could do. The positions included entry level factory help for Surefit, at $5.50-$6.00 per hour; bench technician (trainee)

for Aaron's Window Treatments starting at $6.15 per hour; delivery driver for Get Well Pharmacy for $8.00 per hour; microfilm clerks for Leahy starting at $6.00 per hour; assembler for World Medical through Onsite Commercial Staffing for $6.00-$6.90 per hour; assembler for Lighting Components & Design starting at $5.25 per hour with an increase to $5.55 after 90 days; assembler for Pylon Mfg. Corp at $6.30 per hour; scope repair technician for Surgical-Image Laboratories, Inc. at $7.50 per hour; and citrus canker inspector of the Department of Agriculture through Oasis Staffing. She did not discuss Garcia specifically with the employers, but stated that the positions were within his physical capabilities.

Lange met with Garcia again for a second evaluation on January 3, 2001. She asked Garcia whether he had followed up with the employers she had forwarded to him before. Although he said that he had done so, he had no documentation and could not recall any specific information. Lange was provided additional medical records in advance of the meeting, including treatment records and depositions. Neither Dr. Greener nor Dr. Zager had placed any psychiatric work restrictions on Garcia. Dr. Gilbert had completed a chart showing Garcia's work restrictions indicating that he could sit, stand and walk eight hours; occasionally lift and carry 11 to 20 pounds, and frequently lift and carry up to 10 pounds; frequently bend, squat, crawl, climb and reach above shoulder level; bi-laterally grasp and push or pull repetitively; and use his feet for repetitive movement. She concluded that Garcia was bilingual as they had no trouble communicating in English. Being bilingual in English and Spanish is a vocational asset in south Florida, as is possession of a Class D Chauffeur's license, which Garcia has. The license enables him to drive certain types of vehicles and trucks, but does not allow him to drive passengers, as he does not have a passenger endorsement.

Lange performed a second transferable skills analysis with a different program, which identified essentially the same occupations, such as assemblers, fabricators, repair and machine operator positions. She also used her knowledge of the labor market and available positions to identify suitable work. Garcia told her he would not accept a job which paid only $5.00 per hour. She concluded that he was not motivated to seek entry level positions. She asked him whether he would like to have her assistance in finding work. Garcia said that if any job leads should come up, she should put them in writing. Jobs she identified as available after the second evaluations included service advisor trainee position with Coconut Creek Mitsubishi, paid on commission; assembler or operations associate through Kelly Services at Cordis Corporation for $7.05 per hour; assembler with Raltron Electronics for $7.25 per hour; repair technician with Fiegert Endotech, Inc. for $8.00 per hour; assembler through Team Concepts with Boston Scientific Symbiosis for $7.00-7.50, and World Medical, for $6.00-7.50; invitation assembler position with C'Est Papir for $220 per week (equivalent to $5.50 per hour for a 40 hour week); machine operator with Equality Specialty for $5.50 per hour; watch repair position with Time Zone of Mia, Inc. for $5.50 per week; and optical lab technician with Ultra Lens for $6.00-7.00 per hour. She discussed Garcia and his limitations with representatives of each of the companies. Her January 17, 2001, report describes those contacts. She forwarded information about all these jobs, which Dr. Gilbert had approved as being within the assigned restrictions, to Garcia.

Later, Garcia's attorney wrote to Lange requesting her assistance. Job leads she identified are listed in letters to Garcia's counsel dated January 12, 2001, January 17, 2001, January 22, 2001, and January 26, 2001. She then scheduled appointments to meet with Garcia at potential employers' places of business. They met on January 15, 2001, at Coconut Creek Mitsubishi. Garcia was accompanied by a friend and a child; Lange testified that it would be better to meet alone with a prospective employer. The manager with whom Lange had made the arrangements was unable to attend due to an emergency, but she assisted Garcia in filling out an application. Garcia was 45 minutes late for a January 16, 2001, appointment at Raltron Electronics, where he filled out an application and spoke to the manager, but after Lange had left.[6] The manager later told Lange that other applicants had greater skills. Lange was unable to schedule a mutually convenient time to meet Garcia at Kelly Services. Lange was later told that Garcia never contacted Kelly Services, Team Concepts, C'Est Papir, Quality Specialties, Time Zone Mia, Inc., Ultralens or Professional Speaking. By the time Garcia contacted Fiegert Endotech during the week of January 21, the position Lange identified had already been filled. The representative of All American Parts Distributor could not say whether Garcia applied, but confirmed that he was not hired. Her February 12, 2001, report describes those contacts.

After February 12, 2001, Lange identified two more potential jobs listed with the State of Florida Workforce One office, assembler of electrical boxes and switches for $5.85 per hour, and assembly and disassembly of toner cartridges on an assembly line for $7.50 per hour. Although Lange recommended that Garcia register with the State office, as far as she knew he had not done so.

On cross examination, Lange agreed that the most cost effective means to return Garcia to employment would be to determine if light duty work is available from his previous employer. Lange did not contact Sun Terminals to make such an inquiry. It was her recollection that Garcia told her he had tried to obtain light duty work from Sun Terminals without success. When she performed her second evaluation in January 2001, she asked Garcia what physical complaints he had at that time. Garcia told her he had pain in the left hand, radiating to his left shoulder and neck daily, heavy-feeling pain in the lower back occasionally, and head aches. However, she based her evaluation of his limitations on the information provided by Dr. Gilbert in response to her July 1999 inquiry, primarily involving limitations to use of Garcia's left hand. She did not contact Dr. Gilbert about Garcia's complaints of shoulder and back pain. She conceded that some of the jobs she had identified, such as watch repairer and microscope, required fine motor use of his hands and hand tools which might be inappropriate in view of fine motor limitations of his left hand. She noted, however, that some of his complaints were subjective, and that it was documented in the work hardening program that he gave submaximal effort. Furthermore, Dr. Gilbert had signed approval of the jobs, including those with fine manipulation spelled out in the

[6]In a letter to Lange dated January 22, 2001, counsel for Garcia explained that Garcia did not have reliable transportation and was relying on friends to drive him because his girlfriend was using Garcia's truck to drive to work. Counsel requested that Lange drive Garcia to interviews in Broward County.

job analyses. She could not say how Garcia's six grades of public schooling in Honduras would translate to U.S. grade levels, and she did not perform any testing. She used the information that Garcia had a certificate for completing a diesel mechanic course, and his skilled work history, to judge his reasoning, math and reading ability. Although writing and keyboarding were requirements in the job at Mitsubishi, not required in Garcia's previous work, she said that the Mitsubishi job was a training position in which he could learn the necessary information. She affirmed that pay for that position was based on commission, and conceded that Garcia had not previously worked in the retail market. In her report, she concluded that the wage potential for identified positions was $5.50 to $8.00 per hour, as compared with $11.00 per hour before his injury. She observed Garcia's left hand to be full and larger than the right hand, with shiny skin. There was a bubble, or raised area, on the dorsal surface of the wrist. She stated that she has never been called to testify on behalf of a claimant, in part because she has never been asked, and in part because of her preference. Up to the date of the hearing, the Employer/Carrier had paid her $5525.53 for her services.

Garcia testified in his deposition that he had business cards from many places where he had applied for work. The only two he produced, however, were one from Sentry and one from Miami-Lincoln Mercury. He said the insurance company sent him to Friendly Ford, but was told they did not have the job he was sent for. He said he did not recall which of the companies suggested by Lange he had actually contacted. When asked about specific companies, he said he did contact Integrated Regional Laboratories about the courier position by phone and was told they had already hired someone. He said he went to Sentry Supplement Company to inquire about the vitamin blending production worker, and was told they were not hiring. He did not go to Barton Protective Services because he did not have any money to put gas in his car. He thought he called On-Site Commercial Staffing, and visited Miami-Lincoln Mercury, which did not let him fill out an application. He called Lexus of Kendall, and was told they had no opening. Professionally Speaking told him they hired someone else. He put in an application at Raltron Electronics, but did not recall Ultra Panel, Air Guard, CDA Company, or Creative Shutter and Shade. He said Raltron was seeking people with experience in soldering, which is different than welding. He went to an ambulance facility where he was told they were not hiring. He confirmed that he told Lange he would not accept a job for less money than he used to make. When asked whether he would work if he could find a job using his right hand, he asked, "Assuming I get the fair pay?" Tr. at 205. He testified that he asked Sun Terminals for a job as a lead mechanic, but he did not apply for such positions at any other employers. Lange never suggested that such a job was available.

Suitable Alternative Employment

The medical and vocational evidence establishes that Garcia has been unable to return to his former employment, which required heavy exertion, since he injured his hand. I find that the Employer has established that suitable alternate employment within the limitations to light work established during Garcia's participation in the work hardening program, and adopted by Dr. Gilbert, was available to Garcia beginning on August 12, 1999. Moreover, although Lange was

not provided with the limitations later assessed by Dr. Freshwater, I conclude that some of the jobs she identified, such as driving, service advisor and telemarketing jobs, continued to be within his abilities. I further find that Garcia has failed to show that he diligently tried and was unable to secure such employment. The record does not disclose that Garcia made any independent attempts to find work other than inquiring about light work at Sun Terminals. When his supervisor told him there was no light work available for him at Sun Terminals, however, Garcia made no effort to find work other than to belatedly inquire at a few of the potential employers identified by Lange. Furthermore, Garcia confirmed in his testimony that he was unwilling to except employment at a lower rate than he had been making at Sun Terminals. Thus I conclude that Garcia was temporarily totally disabled by his injury, and entitled to temporary total compensation, from the date of his injury until August 11, 1999. I specifically find that Garcia was compliant with the work hardening program, and that he was entitled to temporary total compensation between July 3 and July 27, 1999, the period during which his temporary total compensation was suspended. Commencing August 12, 1999, Garcia was eligible for temporary partial disability compensation.

Wage Earning Capacity

Section 8(h) of the LHWCA provides:

> (h) The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided*, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. § 908(h).

Where the claimant seeks benefits for total disability and the employer establishes suitable alternate employment, the earnings established for the alternate employment show the claimant's wage-earning capacity. *See Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984). Section 8(h) mandates a two-part analysis in order to determine the claimant's post-injury wage-earning capacity. *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 660 (1979). The first inquiry requires the judge to determine whether the claimant's actual post-injury wages reasonably and fairly represent his wage-earning capacity. In this case, Garcia has earned no wages since his injury. If the actual wages are unrepresentative of the claimant's wage-earning capacity, the second inquiry requires that the judge arrive at a dollar amount which fairly and reasonably represents the claimant's wage-earning capacity. *Randall v. Comfort Control, Inc.*,

725 F.2d 791, 796-97 (D.C. Cir. 1984). Averaging the wage rates for suitable alternative jobs identified by the Employer is an acceptable way to calculate wage earning capacity. *Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326 (5th Cir. 1998).

The wage rate for jobs identified by Lange ranged from $5.50[7] to $9.40 per hour. The average hourly wage rate for those jobs is $6.69,[8] resulting in a weekly rate of $267.60 for a 40 hour week. Pursuant to 33 U.S.C. § 908(e), compensation for temporary partial disability shall be two-thirds of the difference between Garcia's average weekly wages before the injury, stipulated by the parties to be $845.56, and his wage-earning capacity after the injury, for a period up to five years.

Free Choice Physician, Reimbursement for Medical Expenses, and Future Treatment

Counsel for the Claimant argues that Dr. Gilbert was not Garcia's free choice physician and that Dr. Freshwater should be so designated. The record shows, however, that Garcia was advised of his right to his free choice of physician, and that Dr. Gilbert was his free choice physician for some period of time. *See* Admissions, above, and EX 15. In May 2000, Dr. Gilbert issued his opinion that Garcia had reached MMI on March 13, 2000, and gave him a permanent impairment rating. Claimant's request for admissions identifying Dr. Gilbert as his free choice physician was submitted in July 2000, and the Employer/Carrier admitted the request in August 2000. In September 2000, however, when Garcia attempted to return to see Dr. Gilbert, Dr. Gilbert's staff erroneously assessed a $10.00 copayment on Garcia, apparently under the mistaken belief that Florida workers' compensation law applied to him. Garcia testified that he did not see Dr. Gilbert again because he could not afford to pay the fee. I find that Dr. Gilbert's refusal to see Garcia without the payment of a fee was tantamount to refusing treatment. Where an employer's physician's actions constitute a refusal of treatment, the employee is justified in seeking treatment elsewhere, without the employer's authorization, and is entitled to reimbursement for necessary treatment subsequently procured on his own. *Matthews v. Jeffboat, Inc.*, 18 BRBS 185, 189 (1986); *Rivera v. National Metal & Stell Corp.*, 16 BRBS 135 (1984). In the Claimant's Reply Brief, however, counsel notes that Dr. Freshwater did not actually provide treatment, but would do so if authorized. Thus I conclude that counsel's request that Dr. Freshwater be designated as Garcia's free choice physician should be construed as a request for consent for the Claimant to change his treating physician.

---

[7]I have excluded the starting rate of $5.25, which would have increased to $5.55 after 90 days, for the job as assembler for Lighting Components & Design; in its stead, I used the $5.55 rate.

[8]I calculated the average by adding the wage rates and dividing by the total number of jobs with a specified pay rate (25 jobs). Where Lange gave the hourly rate as a range, I used the mid-point of the range as the rate. I did not include a pay rate or count jobs which were paid on commission, or for which no specific pay rate was listed (5 jobs).

Section 7(b) of the Act authorizes the Secretary through his designees to oversee the provision of health care, and provides that a change in physicians at the request of an employee shall be permitted in accordance with regulations of the Secretary. 33 U.S.C. § 907(b); *see* 20 CFR § 702.407. According to the regulations, consent to change a physician may be given on a showing of good cause. 20 CFR § 702.406(a). Both Dr. Freshwater and Dr. Gilbert have recommended that Garcia receive further treatment for pain. In view of Dr. Gilbert's errors in assessing Garcia's impairment, and the refusal to treat him further without a copayment, I find that Garcia has shown good cause and may be given a change of physician if he so wishes. Although I have authority to order payment for medical expenses already incurred, and generally to order future medical treatment for a work-related injury, I do not have the authority to specify a particular facility to provide future treatment. *McCurley v. Kiewest Co.*, 22 BRBS 115, 120 (1989). Moreover, Garcia's testimony included the following exchange:

| | |
|---|---|
| Q[uestion] | Whether it be with Dr. Freshwater or with another doctor, would you want a follow-up on the treatment recommendation that he made? |
| A[nswer] | Yes. |
| Q | Why is that? Why? |
| A | Because I don't feel one hundred percent of what I used to be. |

Tr. at 175. I do not view this testimony as a clear statement that Garcia has decided he wants Dr. Freshwater to be his physician in lieu of Dr. Gilbert. Nor do I view Dr. Freshwater's report and testimony to contain a clear statement of the specific treatment Dr. Freshwater would recommend. Under these circumstances it is beyond my authority to order that Garcia be treated by Dr. Freshwater in the future. *Compare Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 98 (1991) (ALJ could determine the reasonableness and necessity of a single medical procedure for which authorization had been sought and denied, and order the employer to authorize and pay for the procedure). I conclude that the Employer/Carrier is obligated to pay for continued treatment of Garcia's hand, that Garcia should not be required to continue under the treatment of Dr. Gilbert, and that his medical care should continue to be supervised by the District Director and his designees in accordance with the regulations.

Counsel also seeks authorization for further psychiatric treatment by Dr. Greener. The record discloses that the Employer/Carrier has authorized further treatment, *see* EX 24, but that Dr. Greener declined to continue treatment unless certain conditions are met, *see* CX 10. Under the circumstances of this case, I agree that the Employer/Carrier should be ordered to provide future psychiatric care for the mental impairment related to Garcia's work injury, but I cannot order Dr. Greener to undertake treatment he is unwilling to perform. Again, supervision of Garcia's medical care must remain under the direction of the District Director.

In Claimant's Closing Argument Brief, counsel for the Claimant asks that the

Employer/Carrier be required to reimburse Dr. Greener and Dr. Freshwater for their outstanding charges, but did not specify the amount of any such charges. Review of the record discloses that counsel referred Garcia to Dr. Greener for evaluation on December 10, 1999, and paid for one session of treatment on April 10, 2000. Thereafter, in June 2000, the Employer/Carrier authorized treatment, and Dr. Greener saw Garcia on July 17, July 26, August 9, August 23, September 6, September 27, October 18 and November 8. The Employer/Carrier's record of payments, EX 18, shows payments to Dr. Greener for all of the sessions after treatment was authorized. I find that there are no outstanding payments due to Dr. Greener, and that counsel may submit a claim for reimbursement for amounts he paid to Dr. Greener for December 10, 1999, and April 10, 2000, as costs in connection with his fee petition. Dr. Freshwater evaluated Garcia, but did not actually treat him. Counsel for the Claimant paid the cost for the evaluation in advance. *See* EX 21. I find that there are no outstanding payments for treatment due to Dr. Freshwater for the time period before me. Counsel may also submit a claim for reimbursement for the amount he paid to Dr. Freshwater to evaluate Garcia as costs.

Section 14(e) Penalty

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, the employer shall be liable for an additional 10% penalty of the unpaid installments unless the employer files a timely notice of controversion as provided in § 14(d). 33 U.S.C. § 914(e). The penalty also applies if the employer pays compensation on the wrong average weekly wage, in which case the claimant is entitled to the mandatory assessment on the difference between his correct average weekly wage and the wage used by the Employer; or if the employer unilaterally suspends payment. *National Steel and Shipbuilding v. Bonner*, 600 F.2d 1288, 1294-1295 (9th Cir. 1979); *Ramos v. Universal Dredging Corp.*, 15 BRBS 140, 145 (1982); *Tezeno v. Consolidated Aluminum Corp.*, 13 BRBS 778, 783 (1981)*; McNeil v. Prolerized New England Co.*, 11 BRBS 576, 578-579 (1979); *Garner v. Olin Corp.*, 11 BRBS 502, 506 (1979). In this case, the Employer/Carrier paid compensation based on too low an average weekly wage. The earliest controversion which appears in the record is dated August 14, 1998, and stamped received on August 20, 1998, more than 14 days after compensation became due. CX 2. Thus, the 10% penalty of Section 14(e) applies on all installments due between June 10, 1998, and the filing date of the form LS-207, August 20, 1998. The Employer/Carrier filed additional notices of controversion dated July 8, 1999, CX 3, and August 20, 1999, CX 4, both within 14 days of terminating compensation payments to Garcia. Therefore, no penalties are due on payments after August 20, 1998.

Interest

Claimant is entitled to interest on any accrued unpaid compensation benefits. *Canty v. S.E.L. Maduro,* 26 BRBS 147, 153 (1992); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556, 559 (1978), *aff'd in part, revd. in part sub nom. Newport News Shipbuilding & Dry Dock Company v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The purpose of interest is not to penalize employers but, rather, to make claimants whole, as employer has had the use of the money until an award issues. *Newport News Shipbuilding & Dry Dock Co. v. Director,*

*OWCP*, 594 F.2d 986, 987 (4th Cir. 1979); *Renfroe v. Ingalls Shipbuilding, Inc.*, 30 BRBS 101, 104 (1996); *Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 47, 50 (1989). Interest is mandatory and cannot be waived in contested cases. *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833, 837 (1982). Claimant is not entitled to interest upon the additional compensation he will receive pursuant to section 14 (e). *Cox v. Army Times Publishing Co.*, 19 BRBS 195, 198 (1987).

Attorney's Fees

Having successfully established his right to compensation, the Claimant's attorney is entitled to an award of fees under section 28(a) of the Act. 33 U.S.C. § 928(a); 20 CFR § 702.134(a); *Director, OWCP v. Baca*, 927 F.2d 1122, 1124 (10th Cir. 1991). The regulations address attorney's fees at 20 CFR §§ 702.132, 133 and 134. Claimant's attorney has not yet filed an application for attorney's fees. Claimant's attorney is hereby allowed thirty days (30) days to file an application for fees. A service sheet showing that service has been made upon all parties, including the Claimant, must accompany the application. The parties have ten days following service of the application within which to file any objections. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

The claim for benefits filed by Geovanny Garcia on is GRANTED. I therefore ORDER:

1. The Employer/Carrier shall pay temporary total compensation to the Claimant for the period from June 10, 1998, to August 11, 1999, based on an average weekly wage of $845.56, at a compensation rate of $566.53 per week, in accordance with Section 8(b) of the LHWCA, 33 U.S.C. § 908(b). Employer/Carrier shall receive a credit for amounts already paid, totaling $30,805.80.

2. The Employer/Carrier shall pay temporary partial compensation to the Claimant commencing August 12, 1999, at a compensation rate of $387.23 per week, in accordance with Section 8(e) of the Act, 33 U.S.C. § 908(e).

3. The Employer/Carrier shall pay additional compensation of 10% on compensation installments due from June 10, 1998, to August 20, 1998, in accordance with Section 14(e) of the Act, 33 U.S.C. § 914(e).

4. Claimant is entitled to interest on accrued unpaid compensation benefits, other than Section 14(e) penalties. The applicable rate of interest shall be calculated in accordance with 28 U.S.C. §1961.

5. The District Director shall make all calculations necessary to carry out this order.

6. Employer/Carrier shall pay Garcia for all future reasonable and necessary medical care

and treatment arising out of his work-related injury on June 9, 1998, including treatment for his left hand, and for his related psychiatric impairment, pursuant to Section 7(a) of the Act, 33 U.S.C. 907(a).

7. Claimant has shown good cause to change physicians for treatment of his left hand. This matter shall be remanded to the District Director for supervision of Garcia's future medical care and treatment.

8. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy on Claimant and opposing counsel, who shall have ten (10) days to file any objections.

A

Alice M. Craft
Administrative Law Judge